Exhibit 3

******PUBLIC VERSION******

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

APPLICATION OF SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORPORATION AND SNET PERSONAL VISION, INC. TO RELINQUISH SNET PERSONAL VISION, INC.'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY	:	**DOCKET NO. 00-08-14**
	:	**DECEMBER 29, 2000**

BRIEF OF

SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORPORATION,

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, AND

SNET PERSONAL VISION, INC.

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INTRODUCTION

In this proceeding, Southern New England Telecommunications Corporation ("SNET"), The Southern New England Telephone Company ("Telco"), and SNET Personal Vision, Inc. ("SPV") (collectively, the "Companies") respectfully request that the Department of Public Utility Control ("Department") accept SPV's Notice of Intent to Exit the Community Antenna Television ("CATV") Business and Request to Relinquish its Certificate of Public Convenience and Necessity ("CPCN") ("Request to Relinquish"). As evidenced by the record in this proceeding, SPV's decision to return its franchise to the Department results not from any bias by the Companies toward the CATV business or any lack of commitment to Connecticut consumers. Indeed, the Companies, and SNET in particular, have a long history of providing Connecticut customers with a variety of high-quality products and services -- and SPV's provision of CATV service for the past four years has been no exception. Rather, SPV's Request to Relinquish results solely from the failure of the Telco's Hybrid Fiber Coax ("HFC") network to serve as a commercially practicable platform for the delivery of ubiquitous, full service telephony, data and CATV services ("full service network").

As the Department is aware, on September 25, 1996, SPV was granted a CPCN to provide CATV service statewide[1] At the time SPV filed for a cable franchise, it relied upon the Telco concurrently constructing and deploying a statewide HFC network capable of providing both a full suite of telephony services as well as cable services. In

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[1] Docket No 96-01-24, Application of SNET Personal Vision, Inc for a Certificate of Public Convenience and Necessity to Provide Community Antenna Television Service, Decision, Sept. 25, 1996 (hereinafter "SPV Franchise Decision").

other words, SPV would not build and own a cable network; rather, it would rely instead on the Telco's HFC telephony network for delivery of its cable services. SPV planned to lease capacity on the Telco's network and deploy its cable services. Both the Department and SPV assumed this fundamental premise when the Department awarded, and SPV accepted, the statewide CATV franchise.

Less than three years later, however, that basic assumption underlying SPV's franchise was no longer valid. After an extensive analysis, the Companies determined that HFC technology could not function as a viable, cost-effective platform for ubiquitous telephony. Accordingly, on April 1, 1999, the Companies filed an Evaluation of SPV's cable franchise and an Application to Modify Franchise Agreement.[2] In that Franchise Modification Request, SPV proposed to suspend certain franchise obligations while the Companies further evaluated the use of HFC and explored alternative technologies. Specifically, the Companies argued that SPV was entitled to modification of its franchise because it met the commercial impracticability test codified in federal law. See 47 U.S.C. §545

The Department agreed. On August 25, 1999, the Department held that SPV had satisfied the commercial impracticability test specified in federal law and granted the Companies' Franchise Modification Request.[3] It, therefore, allowed modifications of

[2] Docket No 99-04-02, Application of SNET Personal Vision, Inc. to Modify Its Franchise Agreement, Evaluation and Application to Modify Franchise Agreement, April 1, 1999 ("Franchise Modification Request")

[3] Docket No 99-04-02, August 25, 1999, Decision ("Franchise Modification Decision"), at 8-15.

SPV's Franchise Agreement, including the suspension of the build out of SPV's franchise area.[4]

The Department's findings in the Franchise Modification Decision obviously impact the instant proceeding and bear repeating. First, the Department determined that commercial practicability of HFC was a basic assumption upon which SPV's Franchise Agreement was based.[5] Second, the Department found that significant changes occurred or were occurring regarding HFC's viability as a full service network, i.e , a network to provide full service telephony, data and CATV service. As the Department stated, these changes occurred subsequent to the execution of SPV's Franchise Agreement and none of the changes was within the Companies' control [6] Finally, the Department recognized the lack of financial viability of SPV's service over a video-only HFC network.[7] These factors, in combination, served as the foundation for the Department's finding that the Companies met the commercial impracticability test codified at 47 U.S.C. §545.[8]

Pursuant to the Department's Franchise Modification Decision,[9] over the past year the Companies continued their evaluation of the HFC full service network, as well as

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[4] However, the Department directed SPV to serve multiple dwelling units and build underground plant in its current service areas upon customer request without contribution in aid of construction The Companies appealed that aspect of the Department's Decision and are awaiting a ruling See SBC Communications Inc , et al. v Department of Public Utility Control, Docket No. CV 99-0498108S (Conn. Super , Judicial District of New Britain).

[5] Franchise Modification Decision at 8-9

[6] Id at 9-13

[7] Id at 13-15

[8] Id at 15

[9] Id at 17

potential alternative technologies for the provision of telephony, data and video services. That evaluation confirmed the Department's previous determinations regarding HFC and formed the basis for the instant proceeding Specifically, the only credible testimony and record evidence presented in this proceeding demonstrates that nothing has changed since the Department's Franchise Modification Decision: HFC remains incapable of delivering ubiquitous, full service telephony, and SPV cannot financially support the deployment of a video-only HFC network. The evidence before the Department also reveals that a viable alternative technology does not exist at this time that would allow SPV to continue the provision of CATV services in Connecticut.

Yet, with this Request to Relinquish, the Companies do not seek simply to abandon SPV's customers or Connecticut's video marketplace. The Companies have, in fact, informed the Department in this proceeding that SNET plans to present an attractive offer to SPV customers who choose to convert to Digital Broadcast Satellite ("DBS") service as a video alternative.[10] The Companies have also put forth a detailed customer care and withdrawal plan that will facilitate a smooth transition for SPV's customers to their alternative video provider while at the same time assuring that SPV satisfies its commitments to Community Access Providers and its Advisory Council.[11]

Finally, it must also be noted that the focus of the Companies' Request to Relinquish -- and the record in this proceeding -- is on the continued viability of SPV's CATV Franchise without the Telco's underlying full service HFC network. Nothing in

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[10] See Request to Relinquish at 21-23; CATV-35, Transcript ("Tr.") at 227-28.

[11] Request to Relinquish at 16-21

the evidence presented here supports the purported right of any other company to seize or otherwise unilaterally acquire the Telco's existing HFC network. More importantly, as discussed further below, no authority or precedent exists in either federal or state law for the Department to transfer the Telco's HFC network to a third party.

Accordingly, for these reasons and the reasons that follow, the Companies respectfully request Department approval of this Request to Relinquish SPV's CPCN.

I. PROCEDURAL HISTORY

On August 11, 2000, the Companies filed their Request to Relinquish SPV's Certificate of Public Convenience and Necessity. The Request to Relinquish contained the Companies' proposals regarding SPV's customer care plans and transition help for the Advisory Councils and third-party Community Access Providers. The request also included the final technology assessment developed by Technology Resources, Inc. ("TRI") ("TRI Report"), SBC Communications Inc.'s ("SBC") research and technology subsidiary. This report updates information contained in both TRI's Initial Report that accompanied the Franchise Modification Request and TRI's Interim Technology Report filed in March 2000 pursuant to the Department's order in the Franchise Modification Decision.[12] The TRI Report also provides an update and summary comparison of the key video-delivery technology alternatives to HFC that were identified in the March 2000 Interim Report. In addition to the TRI Report, the Companies provided a copy of a letter mailed to SPV's customers notifying them of the filing and explaining SPV's business intentions, as well as Questions and Answers sent to customers. Finally, the Companies

[12] Franchise Modification Decision at 16-17

appended to their Request to Relinquish a matrix detailing the communications plan to the Statewide Advisory Council, local Advisory Councils, and third-party Community Access Providers.

Pursuant to Connecticut General Statutes ("Conn. Gen. Stat.") §16-2a, the Department designated the Office of Consumer Counsel ("OCC") as a party to this proceeding. The Department also designated the Office of Attorney General ("AG"), New England Cable Television Association, Inc., SNET Personal Vision Advisory Council, as well as Cablevision of Connecticut, Limited Partnership, Cablevision of Litchfield, Inc., and Cablevision Systems of Southern Connecticut, Limited Partnership as intervenors in the Docket. On October 11, 2000, the Department also granted Connecticut Telephone & Communication Systems, Inc. and Connecticut Broadband, Inc. (jointly, "CTTEL") intervenor status in the proceeding.

On September 26, 2000, the Department issued its first of several rulings regarding the scope of the instant Docket ("Ruling Regarding Scope"). The September 26th ruling was in response to the OCC's request to retain consultants in this proceeding. In its ruling, the Department made clear that, as a threshold matter, this proceeding concerns issues surrounding the Request to Relinquish SPV's CPCN, including "the level and quality of service, status of the marketplace, and other aspects of the CATV industry, including continued commercial impracticability [of the Telco's HFC network.]" Ruling Regarding Scope, at 4. The Department also unambiguously held that "it would not entertain efforts in this proceeding to relitigate Docket No. 99-04-02."[13]

[13] Department Ruling Regarding AG Motion to Compel, Nov. 2, 2000, at 2. See also Ruling Regarding Scope, at 4

The Department further underscored the limited scope of this proceeding when it restricted CTTEL's participation as an intervenor in this Docket to two issues: the continuing viability of the Companies' HFC network for cable and telephony, and CTTEL's purported rights to acquire the HFC network. Department Ruling on CTTEL's Motion to Compel Disclosure of Proprietary Information, Nov 16, 2000, at 2. See also Docket No. 00-09-25, Department Acknowledgement Letter, Oct. 11, 2000, at 3.[14] On November 16, 2000, the Department reaffirmed the limited scope of this proceeding, holding that: "The Department agrees [that] . . . matters regarding CTTEL's financial ability to acquire the Companies' plant are beyond the scope of this proceeding."[15]

Pursuant to this limited scope, the Department held public hearings in this proceeding on November 20, 21, and December 8, 2000. At the November 20, 2000 hearing, Branford Community Television, Inc. and the Statewide Cable Advisory Council provided public comment. The Companies presented five witnesses in support of their Request to Relinquish: Mr. John Cox, Vice President - Consumer Marketing of the Telco; Ms. Ramona Carlow, Executive Director - Regulatory of SNET; Mr. David Clark, Director - Finance of SNET and President of SPV; Mr. John Andrasik, Director - Engineering Outside Plant of the Telco; and Dr. Ralph Ballart, Vice President - Broadband of TRI. The five witnesses presented testimony in support of the Companies' Request to Relinquish and responded to cross-examination from the Department, the

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[14] See Docket No 00-09-25, Application of CTTEL for CPCN and to Require the Transfer of HFC Network, (hereinafter "CTTEL Application"), Department Ruling, Oct 11, 2000, at 3, stating. "The Department will allow CTTEL to pursue its claims regarding the continuing viability of the Companies' HFC network for cable and telephony, and its rights to acquire the HFC network, in [Docket No 00-08-14]."

[15] Department Ruling Regarding the Companies' General Objection to CTTEL Interrogatories, Nov 16, 2000, at 1

OCC, the AG's office, and CTTEL. The Department continued the November 21, 2000 hearing to December 8, 2000 and also conducted a late-filed exhibit ("LFE") hearing on that same date. These five witnesses also responded to approximately 150 interrogatories and prepared several late-filed exhibits. The Companies submit this Brief in further compliance with the Department's Time Schedule in this proceeding.

II. NO CHANGES HAVE OCCURRED SUBSEQUENT TO THE DEPARTMENT'S FRANCHISE MODIFICATION DECISION WHICH WOULD REQUIRE THE DEPARTMENT TO ALTER ITS FINDINGS

It is a fundamental tenet of administrative law that an administrative agency cannot reverse or revisit a prior decision unless there has been a change of conditions that materially affects the merits of the matter previously decided. Grillo v. Zoning Board of Appeals, 206 Conn. 362, 367 (1988). "Administrative agencies are impotent to reverse [themselves] unless (1) a change of condition has occurred since its prior decision or (2) other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen." Carlson v. Fisher, 18 Conn. App. 488, 497-98 (1989). Indeed, a valid and final judgment of an administrative agency generally has the same preclusive effect as a court judgment. See New England Rehabilitation Hosp. of Hartford, Inc. v. Commission on Hospitals and Health Care, 226 Conn. 105, 128-29 (1993).

As noted, the Department already determined in the Franchise Modification Decision that HFC is not suitable to function as a ubiquitous network providing both full service telephony and cable services Further, the Department found that the failure of HFC to function as a viable, full service telephony network rendered SPV's provision of stand-alone CATV service over the HFC network commercially impracticable. Specifically, after reviewing the evidence before it (evidence that the Department has noted it will not re-litigate here),[16] the Department found:

- HFC was expected to be a modern, financially viable, commercially practicable, full service platform for the delivery of telephony and video services.

- No party to the instant proceeding disputes that SPV's lease of SNET's HFC network in concert with SNET's provision of telephony services over the same network was a basic assumption underlying SPV's CATV franchise award.

- The I-SNET [HFC] network was "proved-in" based on telephony cost savings alone, and the potential video revenues were incremental revenues to the cost savings SNET expected to realize.

- Recent advances in copper loop technologies have led to such a decrease in demand for HFC technology that telecommunications companies' [sic] have, with the exception of the SNET, completely abandoned HFC technology for a full service network

- No incumbent local exchange company is using HFC for full service network in its respective service territories.

- The slate of services that SNET offers today is not available on its HFC network.[17]

Based primarily on these findings of fact, the Department then concluded:

> Commercial practicability of the HFC technology was a basic assumption upon which the requirement to utilize HFC was based. Significant changes occurred or were occurring regarding HFC's viability subsequent to the

[16] See Tr at 276, see also pp 6-7 *supra*

[17] Franchise Modification Decision, Findings of Fact 3-8, at 27.

> execution of SPV's Franchise Agreement, none of which were within the Companies' control. Considered in tandem with the forecasted lack of financial viability, the Department concludes that the Companies have met the commercial impracticability test codified at 47 U.S.C. § 545 and are entitled to modification of the requirements agreed upon in the Franchise Agreement, as described herein [18]

As discussed below, the record evidence in this proceeding demonstrates that no changes have occurred subsequent to the Department's findings in its Franchise Modification Decision regarding either HFC's viability as a combined full service network or the financial viability of SPV's provision of CATV service over a video-only HFC network. Accordingly, the Department's prior findings must stand.

A. The HFC Network Is Still Not Viable For A Combined Full Service Network.

In its Franchise Modification Decision, the Department considered the technical concerns associated with HFC providing a full service platform for combined video and telephony use. The Department ultimately determined that HFC was not viable for the full service network that had been contemplated when SPV's Franchise Agreement was executed. In particular, the Department found:

> The Department finds that significant changes occurred or were occurring regarding HFC's viability subsequent to the execution of SPV's Franchise Agreement. Despite HFC's early promise as a full service network solution, to date, the slate of services that SNET offers today are not available on an HFC network. The magnitude of telecommunications companies' decreased demand for and ultimate abandonment of HFC technology for a full service network was unanticipated, as was the extent to which

[18] Id at 28-29

> telecommunications companies, vendors and suppliers would curtail or abandon rollout of HFC products, thereby curtailing the development of reliable and cost-effective OSS and procedures. Reliability and powering concerns persist, while recent breakthroughs in copper loop technologies such as xDSL have shifted the direction of full service network technology away from the HFC and toward these new technologies. It is reasonable to assume that if the Companies successfully sought a vendor to provide the full slate of necessary circuitry to produce quality telephony products over HFC, those standalone costs to the Companies would be prohibitive.[19]

The Department recognized that incumbent CATV providers are currently using HFC to provide CATV and limited telephony. As the Department explained, however, significant differences exist between what the incumbent CATV providers are doing and what had been contemplated for the SNET HFC network.

> Key distinctions exist between a typical contemporary CATV system rebuild and the replacement telecommunications/CATV network that SNET planned to construct and a portion of which it intended to lease to SPV. Many cable operators are upgrading their plant utilizing HFC for two-way transmission, *but unlike incumbent local exchange companies such as SNET, cable operators are not required to upgrade their plant to provide telecommunications services ubiquitously nor are they required to offer all the services that incumbent telecommunications companies offer.* TRI goes so far as to state that HFC networks are unsuitable to deliver ubiquitous telephony service at this time because of other reasons such as cost-effectiveness and lack of necessary circuitry to provide required services.[20]

No significant developments in HFC telephony have occurred that would alter the Department's findings. The Department's determinations regarding the viability of HFC

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[19] Id at 12-13

[20] Id at 14-15 (emphasis added, citations omitted).

as a full service telephony network continue to be supported by the same evidence presented during consideration of the Franchise Modification Request. In particular, TRI again analyzed the capabilities of HFC networks to deliver the full complement of analog and digital video, data and telephony services. See generally TRI Report. Based on its analysis, TRI determined that current HFC systems are still not suitable for the delivery of the ubiquitous, full service telephony that SNET must be able to provide in Connecticut See TRI Report at 3 ("[o]ur original assessment remains unchanged: modern HFC networks are not currently suitable for the delivery of ubiquitous, full service telephony, and it is not advisable to commit to them at this time."). See also Tr. at 62-63

Additional evidence before the Department in this proceeding supports TRI's conclusion. A number of telephony services that the Telco must offer to Connecticut consumers have still not been developed for HFC. As the incumbent, the Telco must be able to provide a wide range of services to its customers in addition to the basic Plain Old Telephone Services ("POTS"). Tr. at 454, 458; see also TRI Report at 1. As noted by the Companies' witness:

> The HFC network was not -- the business case for the HFC network was not proven in as being a POTS only network. Because we are required to provide the full suite of telephony services, we needed a network that would provide all the services.
>
> We did not intend to have a network sitting there that would provide POTS only and a network that would provide the rest of the telephony services. The network was designed to provide ubiquitous, full service telephony.

Tr at 458; see also Tr. at 61.

Yet, at present, no vendor has developed or is developing a complement of compatible HFC-related components necessary to provide the full slate of telephony services over an HFC network Tr at 185-86. See CATV-2; LFE-17. TRI's survey of major HFC suppliers revealed that none of the suppliers planned to develop essential non-POTS services -- such as digital data services, Fractional T-1 service, analog private line for voice, DID/DOD services and ISDN service -- necessary for full service HFC telephony. TRI Report at 10-12; CATV-2; Tr. at 62. As explained further by Dr. Ralph Ballart, Vice President - Broadband of TRI:

> THE CHAIRPERSON: Are you saying those services cannot be supported on HFC?
>
> THE WITNESS (Ballart)· That's right. What we did this time is we went -- *we surveyed the literature and we also went back and talked to, really, the HFC telephony providers that have essentially the entire business in the United States; that is, ADC, [Arris] and Tel Labs [sic].* We asked them about these services.
>
> It turns out that that the overwhelming majority of the services are not available from those suppliers. They offer, in each case, a few of the services, including the typical POTS service, but they don't offer the full suit [sic] of services.
>
> *It is interesting to note because each of those vendors provides a proprietary solution, we couldn't even mix and match* It is not like you could take a POTS service from . . . [Arris] and a T-1 service from someone else and put them together. Because the initial implementations were proprietary, you have to get them all from one supplier in one way because they use different methods of implementation

Tr. at 62-63 (emphasis added).

In surveying the available products from HFC vendors, TRI not only scoured publicly available literature but also actually contacted the major HFC vendors "[W]e went to the equipment suppliers that provide equipment . . . and we asked them, do you have these services?" Tr. at 188. See Tr. at 687-688 (testimony by Dr. Ballart noting that each individual supplier that TRI contacted provides some of the necessary services but that "none of them provide all those services "). For example, TRI contacted the vendors providing HFC components to AT&T -- Tellabs and Arris-Interactive -- "and discovered that they do not have all of the equipment that would be needed to deliver the full range of telephony services that, for example, [the Telco] offers." Tr. at 699-700. TRI also contacted the Telco's original HFC supplier, Lucent, and determined that "they are not building the equipment that would be at the customer site that would actually put voice signals over the cable." Id at 702

Moreover, contrary to testimony by the OCC's expert, TRI also confirmed that an additional vendor, Alcatel, does not provide the HFC components necessary for full service telephony. Tr at 695-697. Indeed, in response to TRI's inquiry, Alcatel indicated that it does not even offer the necessary HFC components in the United States. LFE-17.[21]

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[21] *In stark contrast to TRI's actual communication with vendors, the OCC's expert based his testimony* almost exclusively on "internet" research he printed "off [his] own computer." Tr at 726 See LFE-18, LFE-19; LFE-20. Of course, it is impossible to verify the credibility or current value of such internet information on its own (even the OCC concedes that the "most direct" method of finding out what a company provides is to talk to that company directly) Tr. at 719 For example, LFE-18, which purportedly documents Alcatel's HFC equipment, contains copyright dates of 1997 and 1998 from Alcatel's European arm See LFE-18 at 6 ("Copyright 1997, 1998 Compagnie Financiere Alcatel, Paris, France") Thus, while the OCC's expert has relied on data two to three years old, TRI contacted Alcatel only weeks ago and received up-to-date confirmation from an Alcatel executive that the company does not have the necessary complement of HFC products. LFE-17 Moreover, the OCC expert's own data also corroborates Dr Ballart's testimony that Alcatel produces HFC products pursuant to European standards and does not offer the required HFC components in the United States See LFE-18; Tr. at 695-96.

The unavailability of certain HFC telephony components and services results primarily from the lack of existing market demand for such HFC technology. TRI Report at 12, Tr. at 85. See also Tr at 63 (noting that the reason the necessary HFC components have not been built is "because all the incumbent telephone companies have really turned away from HFC as a comprehensive full service network"). As the Companies explained in CATV-69:

> [T]he primary characteristic that has delayed development of these services is demand Many of the services (in particular, low-speed services like Analog Private Line for DC Alarm/Telemetry Service) are required/demanded only by embedded telcos/ILECs like SNET who must provide the same services over new technology networks as they provide over existing copper-based networks (i.e., backwards compatibility of services). Since embedded Telcos have abandoned plans to deploy HFC, current demand for these services is low.

Obviously, an incumbent telephony provider such as the Telco simply cannot adopt a replacement technology that cannot support its full range of services. In short, the Telco has an obligation to provide all the telephony services it currently offers over *any* network. As the Companies' witness testified:

> The basic difficulty I am feeling as I listen to this is *whether it is 1,000 services or 100,000 services, we do have customers that have chosen these services for some combination of price and the capability that it provides.*
>
> And it really gets back to the underlying tenet upon which we base this whole endeavor, and that was one network that

Putting aside for the moment the accuracy of the OCC expert's documents, it is also worth noting that his internet "research" itself demonstrates that Alcatel does not offer all the services needed for full service HFC telephony For example, the description of Alcatel's 2-way HFC network platform in LFE-18 only states that "POTS, ISDN and leased line are implemented on the same platform." LFE-18 at 2. Yet, the document gives no indication that the *full suite* of services that the Telco must provide over HFC are supported, or even offered, by Alcatel See LFE-18

> could provide the whole range of services on a ubiquitous basis.
>
> *And it can't work if we need to have some version of two networks, for example, and here again, I think responding to the customers, both from a marketing and customer service standpoint but also in terms of the obligation that I understand the Telco has to provide services under tariff.*

Tr. at 79-80 (emphasis added)

Furthermore, evidence of an increasing interest in and development of CATV Internet Protocol telephony ("IP Telephony") -- as opposed to the traditional circuit-switched technology -- promises to further retard development of full service HFC telephony using spectrum-sharing technology. TRI Report at 6-8; Tr. at 67-68. As TRI found, almost all cable-service providers and equipment suppliers have expressed an intent to migrate to cable IP Telephony. TRI Report at 6; Tr. at 701. To do so, however, "new standards must be established to ensure that voice signals are given the needed priority/quality to meet telephony requirements." TRI Report at 7. <u>See</u> Tr. at 701. As Dr. Ballart testified.

> So, again what is happening is that the industry is sort of *resetting their development schedules* going away from the proprietary implementations and starting anew with these new standardized implementations based on the [IP Telephony] standards.
>
> It takes time to do that. It takes time to deliver these new services and engineer that, again, over a common signal that would carry both cable modem data and telephony . . . *So it is our belief that that will take a considerable amount of time That leads me to believe that all of these services will not be available any time soon.*[22]

[22] Tr at 701.

Yet, even those new standards are developed for IP Telephony, the technology remains in its nascent stages and is not ready for full-scale deployment. According to Dr. Ballart:

> I would say we are still about a year away from seeing standardized solutions for some of those technologies. *Once we get those technologies, the first thing we will do is start trialing some of those standardized solutions.* It is not like in a year we get a solution and now we can deploy to 3 million homes.
>
> What typically would need to be done with the technologies, you would start with the trial, get some of the bugs out and then consider a larger ramp-out, rollout of those kind of services.[23]

Accordingly, the overall likely effect of this switch in focus will be to delay any plans of the CATV/HFC industry to continue developing telephone services that are necessary in a ubiquitous, backwards-compatible telephony replacement network -- such as that contemplated by the original SPV business case. Tr. at 65.

Additionally, the continued lack of market demand for full service HFC components has further prevented the development of reliable and cost-effective Operational Support Systems ("OSS") and procedures. TRI Report at 12-13. See Tr. at 65-66 As explained by Dr. Ballart:

> If you are going to have all these telephony services over HFC, you need computer systems, so-called "operation support systems" to manage them. And, typically, those systems need to be very comprehensive, have a high degree of functionality. They tend to be fairly expensive.[24]

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[23] Id at 68-69 (emphasis added).

[24] Tr at 65-66

While the CATV industry is now developing new OSS to handle various functions over an HFC network, these systems are very early in their development cycle, and it is unclear whether they can provide the quality and/or scale needed for a *ubiquitous full service* network. TRI Report at 13; Tr. at 65-66. Moreover, concerns continue to exist over whether HFC can provide the same level of service quality, reliability and scalability with respect to telephony that customers have come to expect from the Telco. TRI Report at 13-14; Tr. at 66-68.

[BEGIN PARA. 2 PROPRIETARY]

[END PARA. 2 PROPRIETARY] Id See also Tr. at 64 (noting that six or seven years ago "there really was no economical way of adding data services to the copper network" but now high speed data services like ADSL service can be offered over copper networks)

As discussed above, considerable record evidence exists in this proceeding for the Department to determine that no changes have occurred to alter the Department's finding that HFC cannot serve as a viable platform for a full service telephony and cable network. Indeed, much of the Companies' evidence in this regard has gone substantially unchallenged, including evidence and testimony concerning the emergence of alternative, more cost-effective technologies, the industry trend toward IP Telephony, the slowed evolution of reliable and cost-effective OSS, and the continuing concerns over service quality, reliability and scalability. Moreover, the Companies offered the only credible evidence concerning the failure of HFC suppliers to develop the full complement of HFC components necessary to provide ubiquitous telephony services over an HFC network.

In light of this evidence, the Department's original conclusion that HFC was not viable as a full service network remains well grounded Accordingly, the record evidence shows that existing HFC networks are not currently suitable for the delivery of ubiquitous, full service telephony In short, as Dr. Ballart testified:

> So where does that bring us? It brings us where we were last time I was here, essentially, that modern HFC networks are really currently not suitable for the delivery of ubiquitous full-service telephony because we don't have all these capabilities that are available in the marketplace for us to use.[25]

Moreover, the undisputed evidence before the Department demonstrates that a viable alternative technology does not exist at this time that would allow SPV to continue the provision of CATV services in Connecticut.[26]

B. SPV's Provision Of CATV Service Over A Video-Only HFC Network Continues To Be Economically Infeasible And Commercially

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25 Tr at 69

26 **[BEGIN PARA. 2 PROPRIETARY]**

[END PARA. 2 PROPRIETARY]

Impracticable.

As discussed above, the Department's original finding regarding HFC remains unchanged: HFC is incapable of delivering the ubiquitous, full service telephony, data and video services that were contemplated when the SPV Franchise Agreement was executed. Yet, in the Franchise Modification Decision, the Department also acknowledged that "without the ability to utilize HFC for telephony and realize the originally anticipated telephony cost savings, [SPV] cannot financially support the deployment of a statewide HFC video network."[27]

> Under the terms of its existing Franchise Agreement, SPV maintains that it would receive no return on its investment, and in fact, would incur negative returns throughout the study period. As discussed above, SNET "proved-in" its I-SNET [HFC] business case based on the telephony cost savings associated with offering a full suite of telephony services and potential video revenues were incremental revenues to the cost savings that SNET anticipated. SPV would become responsible for the majority of joint costs associated with HFC if it completely fails as a means of providing ubiquitous telephone services . . . .
>
> *The evidence in the instant proceeding supports the Companies' assertion that HFC has not to date proven financially viable, and that it is not expected to do so in the foreseeable future. SPV asserts that the substantial unanticipated cost increases make it economically infeasible and commercially impracticable, even with potentially increased revenue assumptions, for SPV to continue to deploy a video only HFC network without the anticipated allocation to the Telco.*[28]

As discussed below, no change in conditions has occurred that would materially affect or

[27] Franchise Modification Decision at 14 (citations omitted)

[28] Id at 14-15 (citations omitted, emphasis added)

impact the Department' s prior conclusions.

1. Without HFC operating as a full service network, SPV cannot financially support, under any scenario, the continued deployment of an HFC video-only network.

The record evidence here again confirms that without the ability to utilize HFC for telephony and realize the originally anticipated telephony cost savings, SPV, on its own, cannot today financially support the deployment of a statewide HFC video network. See Tr. at 56, 165-166. First, the evidence here reaffirms the Department's previous finding that the original I-SNET (HFC) business case was proved-in based on the telephony cost savings associated with offering a full suite of telephony services -- potential video revenues were incremental revenues to the cost savings the Telco expected to realize Tr. at 167, 458. No participant to the instant proceeding disputes this conclusion

Second, with the failure of full service HFC telephony, SPV necessarily becomes responsible for the majority of joint costs associated with HFC. Tr. at 91-92. See Docket No. 99-04-02, CATV-17.[29] As explained in the Companies response to CATV-71 in this Docket.

> SNET modified its Shared Service Agreement (SSA) for the provision of network facilities to SPV during the annual update of all shared services to be effective 1/1/00 – 12/31/00. The basic structure of the SSA did not change; the only item that changed was the percentage of jointly used network facilities allocated to SPV.
>
> In the April, 1999 filing to the DPUC, the Telco indicated that in the absence of the provision of telephony over HFC,

[29] See Department Ruling Taking Administrative Notice of CATV-17 and CATV-18 in Docket No. 99-04-02, Dec 13, 2000.

> the Telco would be reusing 15% of the HFC network. Therefore, SPV would be responsible for the remaining 85% of the HFC network. *In order to comply with the FCC's prescribed fully allocated costing concept, as set forth in Accounting Safeguard Order 96-150, the Telco was required to make this change so that the SSA is allocated on a cost causative basis Had the Telco not made this change, the Telco ran the risk of creating a situation in which there would have been a cross-subsidy by the telephone subscribers of the cable franchise.*

Emphasis added. <u>See</u> Tr. at 138 [30]

As Mr. Clark further explained to the Department:

> We got through the year 1999 still using the 50/50, even though we did believe the 85/15 was appropriate. In the year 2000, we actually did move to the 85/15 allocation, and that was based on discussions that we had with our external auditors who audit on behalf of the FCC really did confirm our thinking that it was appropriate to move off 50/50, that it was not appropriate for the telephone company to be bearing 50 percent of the share of that, in effect, the Tier 3 part of the network.
>
> Q (Goldberg) Why is that?
>
> A. (Clark) As we indicated, the telephony use proved out, proved not to be possible in a ubiquitous sense, so the original vision of we were going to have a common network, really the 50/50 came from the forward-looking view that in the end state, we would have built this network, and in the end state a customer would have both telephony and cable, and that's really where the 50/50 came from. A customer would have both connections.

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[30] According to Mr Clark

> What we did and that is reflected back in this cost study data but, in effect, we went back and looked at the plant item by item and what it did was it composited to 15 percent overall usage for the Telco Now individual categories such as the fiber category were much higher. Other categories were zero It all composited to 15 percent Telco and 85 percent for Personal Vision

Tr at 138

> Given that ubiquitous telephony turned out not to be the case, it was no longer justified for the telephone company to bear 50 percent of the cost, and that really was the basis of moving then to the 85/15, which was based on the cost study that we filed in CATV, I think it was [CATV] 17 and 18 last time, but was based on an in-depth analysis of the use of the investment.

Tr at 300-302. See also Tr. at 136-137, 327-328 (explaining that the move to 85/15 allocation of joint costs was required by FCC Cost Allocation Manual, parts 32 and 64, as well as Department orders adopting FCC cost allocation rules);[31] and Docket No. 99-04-02, CATV-17 and CATV-18.

Third, the evidence in the instant proceeding also confirms the Department's prior finding that "HFC has not proven financially viable, and that it is not expected to do so in the foreseeable future."[32] Indeed, the testimony indicates that SPV has been losing money since its inception, Tr. at 126-27, and continues to incur steep losses today. See CATV-9; LFE-2; Tr. at 133-34. This is because all of the concrete financial data available, as well as SPV's actual experience, demonstrates that *without the cost savings associated with a shared, full service HFC network, it is not economically feasible for SPV to operate or deploy a video-only network.* Tr. at 56, 167. See CATV-9; CATV-14. As further explained by SPV's President, Dave Clark:

> We did not attain the financials shown on the original projections. *And the basis of this whole application is that the benefits of HFC for telephony just were not forthcoming. So the thing that really proved the network in*

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[31] See Docket No 89-09-02, DPUC Review of the Audit of the Affiliated Interests of The Southern New England Telephone Company, Decision, Jan 29, 1992.

[32] Franchise Modification Decision at 15

> *and proved the investment in were not forthcoming.* And that was reflected in . Docket 99-04-02 and is still true today.
>
> Q. (Samuel) There was no realization on anticipated telephony cost savings?
>
> A. (Clark) That's right. *Because the network could not be used ubiquitously for telephone. There were not the cost savings or revenue benefits on the telephony side.*

Tr. at 165-166 (emphasis added).

Fourth, the evidence before the Department also shows that to this day, even with substantially increased revenue assumptions, it remains economically infeasible and commercially impracticable for SPV to continue to deploy a video-only HFC network. Tr. at 125 [33] See CATV-8; LFE-1. In other words, SPV's financial data indicates that it cannot be profitable under any realistic scenario. LFE-1. Moreover, *that conclusion holds true even assuming a 50/50 cost allocation on a going forward basis.* Tr. at 322, 324, 462 (emphasis added). According to Mr. Clark: "If we are back using that network in a ubiquitous fashion, which would include POTS, that, to me, would justify returning

[33] As Mr Clark testified

> Any one of [the conditions assumed in CATV-8] by themselves completely puts you off the charts So we were thinking in terms of improvement on all fronts.
>
> But, certainly, if we need to in proprietary session we can, but we made some computations, for example, that said okay, what would the penetration rate need to be to get us to break-even? What would the programming costs per subscriber need to be, what would the revenue need to be, et cetera? And those were all outlandish numbers
>
> So then we went back and said then if you got a combination of these working together, computationally you might get a break-even, but we still assessed that it just was not practical, financially viable.

See also LFE-1

to the 50/50 allocation, and if it will help the conversation in terms of a bottom line, 50/50 still is unprofitable for our corporation." Tr. at 322. See LFE-1.

Accordingly, the evidence and testimony outlined above demonstrates that SPV still cannot financially support a stand-alone video HFC network. A video-only HFC network therefore remains "economically infeasible and commercially impracticable" for SPV's provision of CATV service in Connecticut. The Department's prior findings and conclusions in this regard remain intact.

2. No other evidence in this proceeding controverts the conclusion that SPV's provision of CATV service over a video-only HFC network continues to be economically infeasible and commercially impracticable.

Despite the record evidence to the contrary, several participants nevertheless dispute the Department's previous conclusion that SPV cannot financially support a stand-alone video HFC network, even with increased revenue and market penetration assumptions. Notably, CTTEL's witness, John R Jackson, ("Jackson"), alleged that SPV could survive under several scenarios, including as a video-only provider using the extant HFC network. See generally LFE-14 and LFE-15. As discussed below, however, Jackson's assumptions and conclusions contain critical flaws. In sum, Jackson did not provide one piece of actual evidence to support any of the off hand statistics he offered, i e., total penetration rates, operating profits, programming costs, customer acquisition costs, and sales cost incurred. In fact, the only evidence that was offered -- the RCN financial data -- is inconsistent with the totality of Jackson's proffered testimony. Accordingly, the Department should ignore his testimony in its entirety and strike it from the record.[14]

As a threshold matter, Jackson's working assumptions about SPV are incorrect.

[BEGIN PARA. 4(a) PROPRIETARY]

[14] As the Department is aware, CTTEL presented Jackson as a witness on the final hearing day, with less than 24 hours notice to the Department or the Companies. CTTEL's motivation for such a belated announcement was obvious by waiting until the conclusion of the scheduled hearings, CTTEL hoped to present its case free from the scrutiny of interrogatories or other pre-hearing discovery and enjoy the added luxury of preparing its case *after* hearing the Companies' direct evidence and testimony Accordingly, the Companies objected to Jackson's direct testimony on both procedural and substantive grounds. Tr. at 507-511. The Department initially, and correctly, sustained that objection but later reversed its ruling and allowed Jackson to testify after continued prodding from CTTEL Id. at 514, 543-545, 563

The Companies hereby renew their objection to Jackson's testimony for the reason previously stated on the record Tr at 507-511 Briefly, the Department's reversal sacrifices the Companies' statutorily preserved administrative rights upon the altar of expediency As the Companies have noted several times (and the Department has acknowledged), CTTEL is an intervenor in this proceeding with limited rights while the Companies are parties with concrete rights preserved by the Connecticut Uniform Administrative Procedure Act ("UAPA"), common law and Department precedent See Department Ruling on CTTEL Motion to Compel, Nov 17, 2000, Tr at 34-35. By allowing Jackson's testimony, the Department denied the Companies their opportunity to first test his testimony through pre-hearing discovery and, as a practical matter, circumscribed the Companies' rights to inspect any relevant documents relied on by Jackson and to conduct cross-examination and offer rebuttal testimony See, e g , Conn. Gen Stat. §4-177c(a) (guaranteeing a party the opportunity at a hearing the right to inspect and copy relevant materials and to cross examine intervenors and witnesses on the issues involved) Indeed, the Companies were faced with the Hobson's choice of either delaying the hearings further or proceeding with their cross and rebuttal of Jackson with less than an hour to prepare. Finally, the Department's ruling was particularly inappropriate given that the UAPA explicitly grants the Department the authority to limit and define any intervenor's participation in a docket, including the intervenor's right "to introduce evidence " Conn Gen Stat §4-177a(d). Accordingly, for these reasons and those previously espoused on the record, the Companies hereby renew their objection to Jackson's testimony

[35] **[END PARA. 4(a) PROPRIETARY]** Indeed, on cross-examination, Jackson conceded that the company on which he based his models -- RCN -- also included depreciation in its above the line operating losses. Tr. at 673-674. See also RCN Annual Report at 7.

Jackson's use of the RCN franchises as a model for SPV is improper for additional reasons. In fact, Jackson admitted that, unlike SPV, RCN uses predominantly digital technology and provides service only in select cities across the nation. Tr. at 599, 608. Unlike SPV, RCN targets its service to major metropolitan areas with density levels significantly higher than the national average. Tr at 655. See RCN Annual Report at 30-32 (noting that RCN intentionally focuses "on clusters of communities in the most densely populated regions of the country" including San Francisco, Portland, Los Angeles, Boston, Chicago and Washington, D C.). See also id. at 21 (observing that while telecommunications incumbents must operate in "low-density geography," RCN builds in the "densest U.S. markets, thus "fighting on favorable terrain").

Like SPV, however, Jackson's financial role model, RCN, is also incurring heavy financial operating losses. Tr. at 651. See Tr. at 656 (Jackson admitting RCN operating

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[35] **[BEGIN PARA. 4(a) PROPRIETARY]**

[END PARA. 4(a) PROPRIETARY] Tr at 670-671.

losses in the hundreds of millions of dollars). The RCN Annual Report on which Jackson relies shows that RCN experienced an approximately 278 million dollar operating loss in 1999. RCN Annual Report at 55. Moreover, RCN's 3rd Quarter 10Q Report indicates that the company has incurred almost 450 million dollars in operating losses for the first nine months of 2000 alone. RCN 3rd Quarter 10Q Report at 3. Tellingly, RCN itself acknowledges that its operating losses.

> [H]ave resulted primarily from expenditures associated with the development of the [RCN's] operational infrastructure, start up expenses in new markets, and marketing expenses. [RCN] expects it will continue to experience negative operating income while it continues to invest in its networks and until such time as revenue growth is sufficient to fund operating expenses. The Company will be dependent on various financing sources to fund its growth *as well as continued losses from operations*.[36]

As with his assumptions, Jackson's fanciful scenarios are equally flawed. See LFE-15. **[BEGIN PARA. 4(a) PROPRIETARY]**

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[36] RCN 3rd Quarter 10Q Report at 11 (emphasis added)

[END PARA. 4(a) PROPRIETARY] LFE-15; Tr. at 666.

Yet, even assuming SPV could achieve such an increase in subscribers,[37] SPV's actual experience belies Jackson's claims. Indeed, SPV's current programming costs alone devour **[BEGIN PARA. 2 PROPRIETARY]** % **[END PARA. 2 PROPRIETARY]** of SPV's revenue -- not 35% as assumed by Jackson. LFE-1; LFE-15; Tr. at 666. That fact alone highlights the absurdity of Jackson's assumption of a 55% profit margin. Additionally, the Companies' evidence also shows that, in reality, SPV experiences a customer sales and marketing acquisition cost of **[BEGIN PARA. 2 PROPRIETARY]** $ **[END PARA. 2 PROPRIETARY]** per customer exclusive of installation and other hookup costs -- a tangible representation of the increased costs necessary to attract customers in the current landscape where a majority of the potential customers are receiving CATV service and a far cry from Jackson's estimated "one month revenue." LFE-1; Tr at 659.

Finally, Jackson's video scenario improvidently ignores any capital costs associated with an upgrade of the HFC network to provide digital cable service. See LFE-15 As the Companies demonstrated, SPV would in fact have to make a substantial capital investment in order to upgrade the existing analog HFC network to compete with

[37] SPV obviously disputes that it can achieve that increase in any period of time. Tr at 152-153. As Mr Clark explained

> During that earlier time period, our territory was expanding. So as you go into a new area, a new town, you have the opportunity to sign up new customers and win them over from the incumbent cable company Once you have saturated your build-out, the number that you can acquire slows down because you, in effect, you are talking to the same people over and over again.

Tr at 151-52

the incumbent provider's digital networks. Tr. at 703-705. As Dr. Ballart testified:

> Several substantial investments would need to be made. Principal among those are equipment would be needed to convert analog video signals to digital video signals. And you need one of those converters per digital channel, so depending on the number of channels you have, if you have 100, it means you need 100 boxes to do that conversion.
>
> Principally at the customer's site you would need to [get] set top boxes that would convert from digital back to the analog video that is needed by the television sets that are used.
>
> So that is the kind of investment that would be required and those are substantial investments that would be required.[38]

Jackson's remaining scenarios concerning additional "data" and "voice" revenues are similarly defective. See LFE-15. **[BEGIN PARA. 4(a) PROPRIETARY]**

[END PARA. 4(a) PROPRIETARY] Tr. at 672-73. See also Tr. at 707-08 (testimony by Dr. Ballart detailing the expenses associated with providing cable modem service over the existing HFC network, including costs for the cable modem box itself, routers and termination equipment).

[BEGIN PARA. 4(a) PROPRIETARY]

[38] Id. at 704

[39]

[END PARA. 4(a) PROPRIETARY] See LFE-15; CATV-9; LFE-1; LFE-2. Once again, the reality of SPV's financial experience repudiates Jackson's testimony.

As the above discussion makes clear, Jackson has based his testimony almost exclusively on an incompatible business model (RCN) coupled with faulty assumptions that even he concedes must be altered to reflect SPV's actual experience and above-the-line costs. Jackson then compounds his errors by incorporating those erroneous assumptions into purely hypothetical scenarios. Yet, as the evidence here shows, those scenarios also fail to reflect accurately SPV's real world experience and costs. More fundamentally, however, Jackson's testimony also refuses to acknowledge the critical and overriding assumption driving this proceeding: that HFC was expected to be a financially

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[39] See discussion *supra* at pp. 12-13

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[39] See discussion *supra* at pp 12-13

viable, *full service* platform for the delivery of telephony and video services. As such, Jackson's testimony is simply irrelevant to the instant proceeding and should have no bearing on the Department's final decision in this matter. Accordingly, the Companies hereby renew their Motion to Strike Jackson's testimony for the reasons discussed above, as well as those previously stated by the Companies on the record. Tr. at 609-610, 612-614. In the alternative, the Companies urge the Department to ignore the testimony of CTTEL's witness in its entirety.

C. In Light Of The Unchanged Technological And Financial Conditions, The Department Should Accept SPV's Request To Return Its Franchise To The Department.

As discussed above, the only credible testimony and record evidence presented in this proceeding demonstrates that nothing has changed since the Department's Franchise Modification Decision: HFC remains incapable of delivering ubiquitous, full service telephony Moreover, without the ability to utilize HFC for telephony and realize the originally anticipated telephony cost savings, SPV, on its own, cannot today financially support the deployment of a statewide HFC video network. In short, SPV simply cannot continue in the CATV business using an HFC video-only network. SPV, therefore, seeks to return its franchise to the Department and exit the CATV business. As explained below, the Department should accept that request based on its own precedent and findings.

Nothing in the Department's enabling statutes or elsewhere in Connecticut law prevents the Department from accepting a CATV operator's voluntary surrender of its CPCN. Indeed, in Docket No 97-07-05, DPUC Investigation into Whether the

Certificates of Public Convenience and Necessity of FiberVision Corporation of Greater Hartford, FiberVision Corporation of New Haven, FiberVision Corporation of New Britain and FiberVision Corporation of Bridgeport Should Be Revoked, Decision, Sept. 24, 1997 (hereinafter, "FiberVision"), the Department did just that.

The Department originally initiated the FiberVision proceeding under Conn. Gen. Stat. §16-331(a) after FiberVision failed to confirm that it had sufficient funding to finance the needs assessment required by Connecticut law.[40] During the proceeding, however, FiberVision informed the Department that it could not move ahead with construction and continue to function as a competitive CATV service provider in Connecticut due to "obvious changes in the cable industry" that had occurred since FiberVision's initial applications[41] As a result, FiberVision sought to return its CPCNs to the Department. Noting that FiberVision's four franchise areas would continue to be served by at least one certified CATV operator, the Department accepted FiberVision's decision to exit the CATV business and return its franchises to the Department.

Like FiberVision, SPV can no longer function as a competitive CATV provider in Connecticut. As noted in its Franchise Modification Decision, the Department previously determined that HFC is incapable of delivering ubiquitous, full service telephony; without the ability to utilize HFC for full service telephony and realize the originally anticipated telephony cost savings, SPV, cannot today financially continue to support a video-only HFC network. See discussion *supra* at pp. 19-20.

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[40] FiberVision at 3

[41] Id.

The crucial point, as the evidence detailed above demonstrates, is that nothing has changed since the Department made those findings. Connecticut law therefore dictates that the Department's findings regarding commercial impracticability of a video-only HFC network must stand. Grillo, 206 Conn. at 367. See Consolini v. Inland Wetlands Commission of Torrington, 29 Conn. App 12, 16-17 (1992) (holding that the Connecticut Supreme Court has consistently held that "an administrative agency cannot reverse a prior decision unless there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter decided") (citations omitted).

Accordingly, based on its own findings, precedent, and well-settled common law, the Department should accept SPV's Request to Relinquish its CPCN.

III. THE DEPARTMENT LACKS JURISDICTION TO TRANSFER THE TELCO'S HFC NETWORK TO CTTEL OR ANY OTHER COMPANY

By now, the history of the Telco's ownership and construction of the HFC network, and its use by SPV, is of course well known to the Department. Briefly, the HFC network is the Telco's asset. Tr. at 60. The Telco's shareholders, not its ratepayers, incurred the cost of constructing the HFC infrastructure. Id. The Department, of course, has long been aware of these facts [42] SPV, as noted, has never owned or built its own cable network; rather, it has always relied on the Telco's HFC telephony network for

[42] See, e g , Docket No 95-06-17, Application Of The Southern New England Telephone Company For Approval To Offer Unbundled Loops, Ports And Associated Interconnection Arrangements, Decision, December 20, 1995 (discussing the Telco's development and cost allocation of the HFC network) See also New England Cable Television Association, Inc. v Department of Public Utility Control, No CV 970571302, 1998 WL 481744 at * 6-7 (Conn Super Aug 4, 1998 (McWeeny, J) (reviewing several Department Decisions concerning the Telco's HFC network)